Periasamy s/o Sinnappan & Anor v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W-09-8-94 CONSOLIDATED WITH W-09-9-94
GOPAL SRI RAM, MAHADEV SHANKAR JJCA AND AHMAD FAIRUZ J
4 MARCH 1996

Criminal Procedure *— Appeal — Appellate court, power and duty of — Appellate court rejected accused defence which had been accepted as true by trial judge — No misdirection on part of trial judge — Whether amounted to usurpation by appellate judge of a role that was strictly not his*

Criminal Procedure *— Appeal — Appellate court, power and duty of — Whether appellate court could interfere on grounds that trial judge's decision grossly against weight of evidence*

Criminal Procedure *— Charge — Defective charge — Charged with criminal breach of trust under s 409 of Penal Code (FMS Cap 45) proir to amendment in 1993 — Accused was chief executive of bank — Charge alleged offence committed by accused as agent of bank and in such capacity entrusted with dominion over certain property — Whether s 409 referred to professional agents and not casual agents such as company director —Whether charge defective*

Criminal Procedure *— Acquittal or discharge — Trial judge believed upon issue of dishonesty — Whether trial judge should acquit accused*

Criminal Procedure *— Charge — Defective charge — Accused charged with offence unknown to law at material date — Second accused charged for abetting accused in commission of principal offence — Whether second accused could be guilty of abetting a non-existent offence*

Criminal Law *— Penal Code (Malaysia) — s 409 — Prior to amendment made in 1993 — Charge of criminal breach of trust — Interpretation — 'in his capacity of a public servant' — 'in the way of his business'— Meaning of 'agent' — Penal Code (FMS Cap 45) s 409*

Criminal Law *— Penal Code (Malaysia) — s 405 — Entrustment under express or implied contract under s 405 —Whether implied term that owner of property may give consent to its use or disposal in manner differs from the original terms — Whether there can be valid consent subsequent to impugned use or disposal*

The first appellant ('Periasamy') was the chief executive of the Cooperative Central Bank Ltd ('CCB'), while the second appellant ('Balakrishnan') was the assistant general manager of its credit division. Although Periasamy was the chief executive, the de facto executive power lay in the hands of one Mathimugam. In June 1986, three applications for loan facilities totalling RM20m were made by one Looi Thiam Aik ('Looi') to CCB through Mathimugam. Mathimugam instructed Balakrishnan that they be speedily processed. These three applications were indeed speedily processed through the several

departments of CCB, and they were eventually approved by CCB's working committee and the board of directors. On 30 June 1986, CCB wrote a letter to Looi making an offer of the loan facility on an overdraft basis. It was signed by both the appellants. One of the conditions for the grant of the loan was that the borrower should deposit by way of a pledge 4m shares in First Malaysia Finance Bhd ('FMFB'). The letter had also stated that the terms contained therein could be amended or withdrawn at the bank's discretion. This offer was accepted by Looi. The necessary documents for the release of the loan were then prepared and approved by Periasamy. However, it transpired that the shares in question had not been deposited when the loan was released. On 23 July 1986, after the release of the loan, the CCB's management committee met and decided to dispense with the condition that required the deposit of the 4m shares. Against this factual matrix, Periasamy was, inter alia, charged with three counts of criminal breach of trust under s 409 of the Penal Code (FMS Cap 45) ('the Penal Code'), for dishonestly releasing the loan before the FMFB shares were deposited, contrary to the terms of the letter of offer. The charges alleged that the offence was committed by Periasamy as 'an agent of the Cooperative Central Bank Ltd, to wit, the chief executive, and in such capacity entrusted with dominion over certain property' ('the charges against Periasamy'). Balakrishnan was charged with three counts for abetting Periasamy in the commission of the principal offence. The sessions court judge ('the trial judge') accepted Periasamy's defence that he was acting on Balakrishnan's advice, and did not know that the shares were not deposited. The trial judge accordingly acquitted Periasamy on the principal charges, but convicted Balakrishnan on the charges of abetment. In the High Court, Balakrishnan appealed against his conviction while the prosecution appealed against the acquittal of Periasamy. The High Court judge ('the appellate judge') took the view that Periasamy's defence was not believable. It appeared that the appellate judge found that Periasamy was negligent as a chief executive for releasing the loan, and that he committed the offence as soon as he certified, approved and paid out the loan. The appellate judge accordingly reversed the order of acquittal against Periasamy on the ground that the sessions court judge's decision was 'grossly against the weight of evidence', and substituted it with an order of conviction. The order of conviction made against Balakrishnan was affirmed. Both the appellants appealed to the Court of Appeal.

Held, allowing the appeals:

(1) The amendments made by Parliament to s 409 of the Penal Code in 1993 had no application to these appeals as they came into force well after the alleged commission of the offences with which the appellants were charged (see p 571F).

(2) Pursuant to the pre-amended s 409, whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine (see p 571D–E).

(3) Section 409 was in two parts. The first part applied in cases where there had been entrustment of property or its dominion to a person 'in his capacity of a public servant'. The second part applied to cases of entrustment to a category of persons, including an agent 'in the way of his business'. Thus, the word 'capacity' applied to a public servant but not to an agent (see p 571F–G); *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714 and *Mahumarakalage Edward Andrew Cooray v R* [1953] AC 407 followed.

(4) A single act of entrustment might constitute a man an agent within s 409. However, for the section to bite, there must be evidence that the entrustment was made to the particular accused by way of his business as an agent. This was because the section refers to persons who are professional agents, and not to casual agents such as a company director. Thus, the charges against Periasamy were clearly bad (see p 575B–D); *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714 and *Mahumarakalage Edward Andrew Cooray v R* [1953] AC 407 followed.

(5) Even if the charges against Periasamy had been amended at the close of the case for the prosecution to accord with the language of s 409, it would not have mattered, for the evidence led at the trial did not establish the ingredient that the entrustment to Periasamy was *in the way of his business* as an agent (see p 575E–F).

(6) It was clear that the sessions judge believed Periasamy upon the critical issue of dishonesty. Thus, there was no course left open to the sessions judge but to acquit (see p 576B–C); *Mat v PP* [1963] MLJ 263 followed.

(7) The appellate judge when rejecting the defence of Periasamy, which had been accepted as true by the sessions court, undertook his own assessment of Periasamy as witness, when he had not had the benefit of having observed him in the witness box; an advantage which the trial judge distinctly had. This was utterly wrong and smacked of an unwarranted usurpation by the appellate judge of a role that was strictly not his (see p 580D).

(8) The sweeping remarks of the appellate judge that he was under a duty to reverse the sessions court when the decision was grossly against the weight of the evidence clearly contradicted his later finding that the sessions court had properly directed itself upon the evidence that was relevant to the issue of dishonesty. To have interfered with the decision of the trial court after having found no misdirection was unsupportable (see p 580G–H).

(9) The appellate judge was not entitled to interfere on the grounds that the trial judge's decision was grossly against the weight of evidence (see p 580I); *Ooi Teik Chin v PP* [1971] 1 MLJ 51 followed.

(10) The appellate judge appeared to have treated the actus reus as completing the offence of criminal breach of trust when he commented, inter alia, that Periasamy committed criminal breach of trust as soon as he certified, approved and paid out the loan. The offence of criminal breach of trust is not an offence of strict liability. It is only an offence under s 405 of the Penal Code, to convert, dispose or to appropriate property if it is done with a dishonest intention, which constituted the *mens rea* of the offence (see p 581B–D).

(11) The appellate judge dismissed the submission made by Periasamy's counsel based on the defence of honest belief. This statement of the judge was quite wrong and offended elementary principles of law that there will be no criminal breach of trust if the accused's action is in good faith (see p 581F–G).

(12) The appellate judge appeared to have equated negligence with dishonesty. It is settled law that negligence, even gross negligence, is not to be equated with the definition of dishonesty under the Penal Code (see p 582B–C); *PP v Mohamed bin Abdul Jabbar* [1948–49] MLJ Supp 74 followed.

(13) The appellate judge did not sufficiently address his mind to the decision of *Khoo Hi Chiang v PP* [1994] 1 MLJ 265, in disobedience to the doctrine of *stare decisis* (see p 582C–D).

(14) All that has been said in respect of the way in which the charges were framed against Periasamy applied with equal force to Balaskrishnan. Periasamy was being charged with an offence unknown to the law as it stood at the material date. Accordingly, Balakrishnan could not be guilty of abetting a non-existent offence (see p 583C–D).

(15) The offence of criminal breach of trust is an offence relating to property and its commission is directed against the beneficial owner of that property. So, there can be no criminal breach of trust where the beneficial owner consents to the use of the

property in a particular way. That consent of the beneficial owner is a complete defence to the offence of criminal breach of trust (see p 585C–D).

(16) It was an implied term in every entrustment under the express or implied contract, referred to in s 405, that the owner of property may give his express or implied consent to its use or disposal in a manner that differed from the original terms governing its use or disposal (see p 585F–G).

(17) Whether there could be a valid consent subsequent to the impugned use or disposal depended on the facts of each case. Where facts emerge to show that there was true consent in its legal sense, the fact that it did not precede the use or disposal cannot, in principle, make the slightest difference to the question. Such subsequent consent would, in accordance with well-established principles of the law of agency, relate back to the use or disposal that is the subject of challenge. It was emphasized that for the principle to apply, there must be present all those elements which would constitute consent in law (see pp 587E–F and 587G–H).

(18) In the present appeal, the authority to deal with the property of the bank was vested in the management committee. There was no doubt that it was empowered to dispense with the shares ab initio. Once it made up its mind at its meeting on 23 July 1986 to dispense with the requirement that the shares should be deposited, the whole issue became academic (see p 587I).

(19) Quite apart from the points of law on which these appeals must succeed, the approach adopted by the trial court to the evidence before it amounts to a misdirection that has occasioned a miscarriage of justice. The main evidence relied upon to convict Balakrishnan upon the charge of abetment was the testimony of Periasamy to the effect that he had been deceived by Balakrishnan into believing that all the documents were in order at the material time. But there was other evidence to negative culpability on the part of Balakrishnan. The evidence presented fell far short of establishing a case of abetment by instigation (see pp 588H, 588C–D and 588F).

(20) For the reasons given, the appellants ought to have been acquitted at the close of the case for the prosecution. The trial judge was therefore wrong in ordering both appellants to enter upon their defence. On appeal, the appellate judge was wrong in reversing the order of acquittal that had been made in Periasamy's favour by the trial court and in dismissing the second appellant's appeal against conviction. In the circumstances, the appeals were allowed and the appellants were acquitted (see pp 588I and 589A–B).

Obiter

Upon the assumption that the charges against Periasamy were good (which was not the case), the acquittal of Periasamy on the merits of his defence did not mean that Balaskrishnan was automatically entitled to an acquittal as well (see p 583E).

[Bahasa Malaysia summary

Perayu pertama ('Periasamy') adalah ketua eksekutif kepada Cooperative Central Bank Ltd ('CCB'), sementara perayu kedua ('Balakrishnan') adalah penolong pengurus besar di bahagian kredit. Walaupun Periasamy adalah ketua eksekutif, kuasa eksekutif de facto terletak di tangan seorang yang bernama Mathimugam. Dalam bulan Jun 1986, tiga permohonan untuk kemudahan pinjaman berjumlah RM20 juta telah dibuat oleh seorang yang bernama Looi Thiam Aik ('Looi') kepada CCB melalui Mathimugam. Mathimugam mengarahkan Balakrishnan supaya memproses permohonan itu dengan segera. Malahan, ketiga-tiga permohonan itu telah diproses dengan segera melalui beberapa jabatan CCB, dan permohonan itu kemudiannya diluluskan oleh jawatankuasa kerja CCB dan lembaga pengarah. Pada 30 Jun 1986, CCB menulis sepucuk surat kepada Looi membuat tawaran kemudahan pinjaman atas dasar overdraf. Ia ditandatangani oleh kedua-dua perayu. Salah satu daripada syarat-syarat pemberian pinjaman ialah peminjam harus mendepositkan 4 juta syer First Malaysia Finance Bhd ('FMFB') sebagai cagaran. Surat itu juga menyatakan bahawa terma-terma yang terkandung di dalamnya boleh dipinda atau ditarik balik atas budi bicara bank. Tawaran itu telah diterima oleh Looi. Dokumen-dokumen yang perlu untuk pelepasan pinjaman itu kemudiannya disediakan dan diluluskan oleh Periasamy. Bagaimanapun, adalah diketahui pada kemudiannya bahawa syer berkenaan tidak dicagarkan apabila pinjaman itu dilepaskan. Pada 23 Julai 1986, selepas pelepasan pinjaman itu, jawatankuasa pengurusan CCB bermesyuarat dan memutuskan bahawa syarat yang menghendaki cagaran 4 juta saham tersebut tidak terpakai. Berdasarkan matriks kenyataan ini, Periasamy telah, antara lain, dipertuduh dengan tiga pertuduhan pecah amanah jenayah di bawah s 409 Kanun Keseksaan (FMS Cap 45) (Kanun Keseksaan), kerana dengan dia telah secara tidak jujur melepaskan pinjaman itu sebelum syer FMFB dicagarkan, bertentangan dengan terma-terma surat tawaran. Pertuduhan-pertuduhan itu mengatakan bahawa Periasamy telah melakukan kesalahan itu sebagai 'ejen Cooperative Central Bank Ltd, iaitu sebagai ketua eksekutif, dan dalam keupayaan itu diamanahkan penguasaan ke atas harta tertentu' ('pertuduhan terhadap Periasamy'). Balakrishnan pula dipertuduh dengan tiga pertuduhan kerana bersubahat dengan Periasamy dalam melakukan kesalahan utama. Hakim mahkamah sesyen ('hakim perbicaraan') menerima pembelaan Periasamy bahawa dia bertindak di atas nasihat Balakrishnan, dan tidak mengetahui bahawa syer

A tersebut tidak dicagarkan. Hakim perbicaraan dengan itu membebaskan Periasamy atas pertuduhan utama, tetapi menyabitkan Balakrishnan atas pertuduhan bersubahat. Dalam Mahkamah Tinggi, Balakrishnan merayu terhadap sabitannya sementara pihak pendakwaan merayu terhadap pembebasan Periasamy. Hakim mahkamah tinggi ('hakim rayuan') berpendapat bahawa pembelaan B Periasamy tidak boleh dipercayai. Nampaknya hakim rayuan mendapati bahawa Periasamy telah melakukan kecuaian sebagai ketua eksekutif dalam melepaskan pinjaman itu, dan bahawa dia telah melakukan kesalahan itu sebaik sahaja dia mengesahkan, meluluskan dan membayar pinjaman itu. Hakim rayuan dengan itu mengakas C perintah pembebasan terhadap Periasamy atas alasan bahawa keputusan hakim mahkamah sesyen adalah 'terlalu bertentangan dengan bukti', dan menggantikannya dengan perintah sabitan. Perintah sabitan terhadap Balakrishnan telah disahkan. Kedua-dua perayu merayu kepada Mahkamah Rayuan.

D **Diputuskan**, membenarkan rayuan-rayuan itu:

(1) Pemindaan yang dibuat oleh Parlimen kepada s 409 Kanun Keseksaan dalam tahun 1993 tidak terpakai untuk rayuan-rayuan ini kerana pemindaan itu berkuatkuasa lama selepas kesalahan yang perayu-perayu dipertuduh itu dibuat (lihat E ms 571F).

(2) Mengikut s 409 sebelum pindaan, sesiapa, dalam apa cara diamanahkan dengan harta, atau dengan penguasaan ke atas harta, dalam keupayaannya sebagai penjawat awam atau dalam cara perniagaannya sebagai pemilik bank, saudagar, faktor, F broker, wakil, atau ejen, melakukan pecah amanah jenayah berkaitan dengan harta itu, akan dihukum dengan penjara untuk jangkamasa yang mungkin melebihi dua puluh tahun, dan akan juga dikenakan denda (lihat ms 571D–E).

(3) Terdapat dua bahagian dalam s 409. Bahagian pertama terpakai dalam kes-kes di mana terdapat pengamanahan harta atau G penguasaan ke atasnya kepada seseorang 'dalam keupayaannya sebagai penjawat awam'. Bahagian kedua terpakai dalam kes-kes pengamanahan kepada kategori orang-orang termasuk ejen 'dalam cara perniagaannya'. Oleh itu, perkataan 'keupayaan' terpakai kepada penjawat awam tetapi tidak kepada ejen (lihat H ms 571F–G); *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714 dan *Mahumarakalage Edward Andrew Cooray v R* [1953] AC 407 diikut.

(4) Satu tindakan pengamanahan yang tunggal mungkin menyebabkan seseorang itu menjadi ejen di bawah s 409. I Tetapi, untuk seksyen itu beroperasi, mesti terdapat bukti bahawa pengamanahan telah dibuat kepada tertuduh yang tertentu dengan cara perniagaannya sebagai ejen. Ini adalah kerana seksyen itu merujuk kepada orang-orang yang

merupakan ejen profesional, dan bukan kepada ejen kasual seperti pengarah syarikat. Oleh itu, pertuduhan terhadap Periasamy adalah jelas tidak elok (lihat ms 575B–D); *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714 and *Mahumarakalage Edward Andrew Cooray v R* [1953] AC 407 diikut.

(5) Jika pun pertuduhan terhadap Periasamy telah dipinda pada penutupan kes pendakwa untuk mengikut bahasa s 409, ianya tidak memberi apa-apa kesan, kerana bukti yang dikemukakan di perbicaraan tidak menunjukkan unsur bahawa pengamanahan kepada Periasamy adalah *dalam cara perniagaannya* sebagai ejen (lihat ms 575E–F).

(6) Adalah jelas bahawa hakim mahkamah sesyen mempercayai Periasamy atas isu kejujuran yang kritikal. Oleh itu, tidak ada cara lain yang terbuka kepada hakim mahkamah sesyen selain daripada membebaskan (lihat ms 576B–C); *Mat v PP* [1963] MLJ 263.

(7) Hakim rayuan apabila menolak pembelaan Periasamy, yang telah diterima sebagai betul oleh mahkamah sesyen, mengambil pendapatnya sendiri mengenai Periasamy sebagai saksi, bila beliau tidak mempunyai kelebihan untuk memeriksanya di dalam kotak saksi; satu kelebihan yang jelas ada pada hakim perbicaraan. Ini adalah benar-benar salah dan mempunyai unsur-unsur perampasan yang tidak wajar oleh hakim rayuan terhadap tugas yang betul-betul bukan kepunyaannya (lihat ms 580C–D).

(8) Teguran umum yang dibuat oleh hakim rayuan bahawa beliau adalah di bawah suatu kewajipan untuk mengakas mahkamah sesyen apabila keputusannya adalah terlalu bertentangan dengan bukti jelas berlawanan dengan pendapat beliau pada kemudiannya bahawa mahkamah sesyen telah menumpukan perhatian secara wajar pada bukti yang relevan atas isu ketidakjujuran. Mencampur tangan dengan keputusan mahkamah perbicaraan selepas mendapati tiada salah arah adalah tidak boleh disokong (lihat ms 580G–H).

(9) Hakim rayuan tidak berhak mengganggu atas alasan bahawa keputusan hakim perbicaraan terlalu berlawanan dengan bukti (lihat ms 580I); *Ooi Teik Chin v PP* [1971] 1 MLJ 51 diikut.

(10) Hakim perbicaraan nampaknya telah menganggap actus reus sebagai menyempurnakan kesalahan pecah amanah jenayah apabila beliau membuat komen, antara lain, bahawa Periasamy telah melakukan pecah amanah jenayah sebaik sahaja dia mengesah, melulus dan membayar pinjaman itu. Kesalahan pecah amanah jenayah tidak merupakan suatu kesalahan liabiliti ketat. Ia hanya merupakan suatu kesalahan di bawah s 405 Kanun Keseksaan untuk menukarmilik, menjual atau mengambil harta jika ia dilakukan dengan tujuan yang tidak

jujur, yang membentuk *mens rea* kesalahan itu (lihat ms 581B–D).

(11) Hakim rayuan telah menolak hujah yang dibuat oleh peguam Periasamy berdasarkan pembelaan kepercayaan jujur. Pernyataan yang dibuat oleh hakim ini adalah salah dan telah melanggar prinsip asas undang-undang bahawa tiada terdapat pecah amanah jenayah jika tindakan tertuduh adalah dengan suci hati (lihat ms 581F–G).

(12) Nampaknya hakim rayuan telah menyamakan kecuaian dengan ketidakjujuran. Adalah undang-undang mantap bahawa kecuaian, malah kecuaian melampau, tidak patut disamakan dengan takrif ketidakjujuran di bawah Kanun Keseksaan (lihat ms 582B–C); *PP v Mohamed bin Abdul Jabbar* [1948–49] MLJ Supp 74 diikut.

(13) Hakim rayuan tidak menumpukan perhatian dengan secukupnya kepada keputusan dalam *Khoo Hi Chiang v PP* [1994] 1 MLJ 265, dan telah mengingkari doktrin *stare decisis* (lihat ms 582C–D).

(14) Apa yang telah dikatakan berhubung dengan cara dalam mana pertuduhan telah dibuat terhadap Periasamy juga terpakai sepenuhnya kepada Balakrishnan. Periasamy dipertuduh dengan suatu kesalahan yang tidak wujud dalm undang-undang yang berkuatkuasa pada tarikh material. Ekoran itu, Balakrishnan tidak mungkin bersalah atas kesubahatan kesalahan yang tidak wujud (lihat ms 583C–D).

(15) Kesalahan pecah amanah jenayah merupakan suatu kesalahan berkaitan dengan harta dan kesalahan adalah dilakukan terhadap pemunya benefisial harta tersebut. Jadi, tidak terdapat pecah amanah jenayah jika pemunya benefisial bersetuju kepada penggunaan harta dalam suatu cara tertentu. Persetujuan pemunya harta merupakan pembelaan sempurna kepada kesalahan pecah amanah jenayah (lihat ms 585C–D).

(16) Adalah merupakan suatu terma tersirat dalam setiap amanah di bawah kontrak nyata atau tersirat, yang dirujuk dalam s 405, bahawa pemunya harta boleh memberi persetujuan secara nyata atau tersirat kepada penggunaan atau pelupusan harta itu dalam cara yang berbeza daripada terma asal yang menguasai penggunaan atau pelupusannya (lihat ms 585F–G).

(17) Sama ada atau tidak adanya persetujuan sah ekoran daripada penggunaan atau pelupusan yang dipersoalkan bergantung kepada fakta setiap kes. Di mana fakta muncul bagi menunjukkan bahawa terdapat persetujuan sebenar di sisi undang-undang, fakta bahawa ia tidak mendahului penggunaaan atau pelupusan tidak boleh, atas prinsip, membuat sebarang perbezaan kepada persoalan itu. Persetujuan demikian akan, menurut prinsip undang-undang ejensi yang telah mantap,

berhubung balik kepada penggunaan atau pelupusan yang merupakan subjek yang dicabarkan. Ia telah pun ditegaskan bahawa supaya prinsip itu terpakai, mesti hadirnya semua unsur yang membentuk persetujuan dalam ertikata undang-undang (lihat ms 587E–F and 587G–H).

(18) Dalam rayuan ini, kuasa untuk berurusan dengan harta bank tersebut diletakhak kepada jawatankuasa pengurusan. Tiada keraguan bahawa ianya berkuasa untuk memutuskan bahawa syer yang berkenaan tidak diperlukan ab initio. Sebaik sahaja ia mengambil keputusan bahawa syer yang berkenaan tidak perlu didepositkan di mesyuarat pada 23 Julai 1986, keseluruhan isu telah menjadi akademik (lihat ms 587I).

(19) Selain daripada segi undang-undang atas mana rayuan-rayuan ini harus berjaya, pendekatan yang diterima-pakai oleh mahkamah perbicaraan dalam mempertimbangkan bukti merupakan suatu salah arah yang menyebabkan salah laksana keadilan. Bukti utama yang diharapkan untuk menyabitkan Balakrishnan atas pertuduhan persubahatan adalah testimoni Periasamy bahawa dia telah diperdaya oleh Balakrishnan untuk mempercayai bahawa kesemua dokumen adalah sempurna pada masa material. Tetapi, terdapat bukti lain untuk menyangkal kebersalahan pada pihak Balakrishnan. Bukti yang dikemukakan tidak mencukupi bagi menwujudkan suatu kes persubahatan melalui hasutan (lihat ms 588H, 588C–D dan 588F).

(20) Atas sebab yang diberikan, perayu-perayu seharusnya dibebaskan pada penghujung kes pihak pendakwaan. Oleh yang demikian, hakim perbicaraan adalah salah dalam membuat perintah supaya kedua-dua perayu memasukkan pembelaan. Atas rayuan, hakim rayuan adalah salah dalam mengakas perintah pembebasan yang dibuat memihak kepada Periasamy oleh mahkamah perbicaraan dan dalam menolak rayuan perayu kedua terhadap sabitan. Dalam keadaan ini, rayuan-rayuan telah dibenarkan dan perayu-perayu dibebaskan (lihat ms 588I dan 589A–B).

Obiter

Atas andaian bahawa pertuduhan terhadap Periasamay adalah elok (walaupun bukan begitu dalam kes ini), pembebasan Periasamy atas merit pembelaan tidak bermaksud bahawa Balakrishnan juga berhak kepada pembebasan secara langsung (lihat ms 583F).]

Notes

For cases on criminal appeal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 109–446.

For cases on acquittal and discharge, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 61–104.

A For cases on charge, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 606–919.

Cases referred to

Faguna Kanta Nath v State of Assam AIR 1959 SC 673
B *Kee Kim Chooi & Ors v PP* [1952] MLJ 180
Lim Kheak Teong v PP [1985] 1 MLJ 38
Mahadi v PP [1970] 1 MLJ 16
Mahumarakalage Edward Andrew Cooray v R [1953] AC 407
Mangal Sen v Emperor AIR 1930 Lah 57
Mat v PP [1963] MLJ 263
C *Ooi Teik Chin v PP* [1971] 1 MLJ 51
PP v Mohamed bin Abdul Jabbar [1948–49] MLJ Supp 74
PP v Vijaya Raj [1981] 1 MLJ 43
PP v Yeoh Teck Chye [1981] 2 MLJ 176
RK Dalmia v Delhi Administration AIR 1962 SC 1821
D *Sheo Swarup v King-Emperor* AIR 1934
Wilayat Khan v State of Uttar Pradesh AIR 1953 SC 122
Yap Sing Hock & Anor v PP [1992] 2 MLJ 714

Legislation referred to

Cooperative Societies Act 1948
E Courts of Judicature Act 1964 s 66 [repealed]
Criminal Procedure Code (FMS Cap 6) ss 107, 405, 409
Prevention of Corruption Act 1961
Penal Code (FMS Cap 45) s 409 [prior to the amendment made in 1993]
F Penal Code ss 389, 392 [Ceylon]
Penal Code s 409 [India]

CV Das (*Radzi Sheikh Ahmad* and *KP Gengadharan* with him) (*Kayveas & Co*) for the appellant in Criminal Appeal No W–09–8–94.

V Manokaran (*Jasmeetpal Singh* with him) (*Wan Majid Mano & Nada*)
G for the appellant in Criminal Appeal No W–09–9–94.

Mohd Yusof bin Haji Zainal Abidin (Senior Federal Counsel) for the respondents.

Cur Adv Vult

H **Gopal Sri Ram JCA** (delivering the judgment of the court): We heard and allowed these appeals on 4 September 1995. The reasons for our decision now follow.

Facts and background

I Periasamy s/o Sinnappan — whom we shall throughout this judgment refer to as 'the first appellant' — was charged in the Sessions Court at Kuala Lumpur on three counts of criminal breach of trust. Balakrishnan

s/o Nalliah, whom we shall refer to as 'the second appellant', was charged with three counts of abetting the first appellant in the commission of the principal offence. The appellants were jointly tried. For completeness, we will set out the amended charges framed against each appellant.

As against the first appellant, the following charges were framed:

First Charge

That you on 11 July 1986 at the Cooperative Central Bank Ltd, 107 Jalan Bunus, in the Federal Territory of Kuala Lumpur, being an agent of the Cooperative Central Bank Ltd, to wit, the chief executive and in such capacity entrusted with dominion over certain property, to wit, RM16,004,159.68 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s 409 of the Penal Code.

Second Charge

That you on 11 July 1986 at the Cooperative Central Bank Ltd, 107 Jalan Bunus, in the Federal Territory of Kuala Lumpur, being an agent of the Cooperative Central Bank Ltd, to wit, the chief executive and in such capacity entrusted with dominion over certain property, to wit, RM2,000,000 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s 409 of the Penal Code.

Third Charge

That you on 16 July 1986 at the Cooperative Central Bank Ltd, 107 Jalan Bunus, in the Federal Territory of Kuala Lumpur, being an agent of the Cooperative Central Bank Ltd, to wit, the chief executive and in such capacity entrusted with dominion over certain property, to wit, RM1,995,837.10 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s 409 of the Penal Code.

The charges framed against the second appellant read as follows:

First Charge

That you, between 14 June 1986 and 11 July 1986 at the Cooperative Central Bank Ltd, 107 Jalan Bunus, in the Federal Territory of Kuala Lumpur, abetted the commission of the offence of criminal breach of trust of certain property, to wit, RM16,004,159.68 belonging to the Cooperative Central Bank Ltd by an agent, namely, Periasamy s/o Sinnappan which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under ss 109 and 409 of the Penal Code.

Second Charge

That you, between 14 June 1986 and 11 July 1986 at the Cooperative Central Bank Ltd, 107 Jalan Bunus, in the Federal Territory of Kuala Lumpur, abetted the commission of the offence of criminal breach of trust of certain property, to wit, RM2,000,000 belonging to the Cooperative Central Bank Ltd by an agent, namely, Periasamy s/o Sinnappan which offence was committed in consequence of your abetment and that you have

thereby committed an offence punishable under ss 109 and 409 of the Penal Code.

Third Charge

That you, between 14 June 1986 and 16 July 1986 at the Cooperative Central Bank Ltd, 107 Jalan Bunus, in the Federal Territory of Kuala Lumpur, abetted the commission of the offence of criminal breach of trust of certain property, to wit, RM1,995,837.10 belonging to the Cooperative Central Bank Ltd by an agent, namely Periasamy s/o Sinnappan which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under ss 109 and 409 of the Penal Code.

The facts relevant to the case against both appellants may be shortly stated.

The Cooperative Central Bank Ltd — or CCB, as it was more popularly known — was not a bank at all. It was a co-operative society established under the provisions of the Cooperative Societies Act 1948. We will, however, for convenience, refer to it in this judgment as 'the bank'. At all material times, the first appellant was the chief executive of the bank, while the second appellant was its assistant general manager, credit division. From the evidence recorded at the trial and from the comments of the sessions judge and the appellate judge, it appears that the bank was — to say the very least — poorly managed by those having de facto management of it.

As to the circumstances in which the first appellant joined the bank and his position therein, it is, we think, appropriate to quote from the judgment of the learned sessions judge. This is what he said:

> The first accused besides being a law practitioner was appointed to be a member of the board of directors of CCB in 1981 and as a member of working committee and later as a chairman of the management committee. On 26 May 1986 the first accused was appointed as chief executive and on 11 and 16 July 1986 he was alleged to have committed criminal breach of trust.
>
> The first accused became the chief executive on the encouragement and insistence of the former chief executive by the name of Mathimugam.
>
> Later the first accused discovered that he was deceived by Mathimugam as to the fact that CCB was a co-operative of solid financial standing, with an efficient administration and suitable enough for the first accused to take over from as to enable him (Mathimugam) to be active in the international co-operative movement. It is no wonder the first accused never had an office nor an assistant, because Mathimugam was still in power and still occupied the chief executive's room. There was friction, then, between Mathimugam and the first accused.

It is clear from the foregoing passages that the sessions judge accepted as a fact that, although the first appellant bore the glorified title of 'chief executive', the real executive power lay in the hands of Mathimugam, the bank's former chief executive. Mathimugam, by all accounts made available

to the sessions court, ran the bank as if it were his own; a man of extreme criminal cunning who has, with much success, thwarted all attempts to have him extradited from Australia. A

In June 1986, three applications for a facility totalling RM20m were made by one Looi Thiam Aik ('Looi') to the bank. Though made in his name, the loan was, in reality, required by his relatives. The evidence reveals that the three applications came through Mathimugam to the second appellant with instructions from the former to the latter that they be speedily processed and placed before the working committee for its approval. It is common ground that these three applications were indeed speedily processed through the several departments of the bank and approved by its working committee and later confirmed by the board of directors. B C

On 30 June 1986, the bank wrote a letter to Looi making an offer of the loan facility on an overdraft basis. It was signed by both appellants and contained the terms upon which the offer was being made. One of the conditions for the grant of the loan expressed in the offer was that the borrower shall deposit, by way of a pledge, four million shares in First Malaysia Finance Bhd. However, the letter in its opening paragraph made it amply clear that the terms contained therein could be altered or amended or withdrawn at the bank's discretion. This offer was accepted by Looi. D

Later, the necessary accounting and other internal documents for the release of the money comprised in the loan were prepared and approved by the first appellant. However, it transpired that the shares in question had not been deposited when the loan was released. E

On 23 July 1986, that is to say, after the release of the loan, the bank's management committee chaired by Mathimugam met and decided to dispense with the condition that required the deposit of the four million shares. There is no dispute — indeed, it is common ground — that the management committee was empowered to do so. F

It is against this factual matrix that the charges earlier adverted to were framed against the appellants.

At the close of the case for the prosecution, the sessions judge called upon the appellants to enter upon their defence. Then, having heard their evidence and submissions made for and against them, he acquitted the first appellant on the principal charges but convicted the second appellant on the charges of abetment and sentenced him to a term of eight years on each charge. G H

The second appellant then appealed against his conviction while the prosecution appealed against the acquittal of the first appellant. Both appeals came before Syed Ahmad Idid J who, in a reserved judgment, affirmed the order of conviction against the second appellant, reversed the order of acquittal in favour of the first appellant and entered an order of conviction against him. He also made the following orders in respect of sentence: I

(i) as against the first appellant:

(a) a term of five years' imprisonment and a fine of RM1m, in default a further term of one year's imprisonment on the first charge; and

(b) a term of two years' imprisonment and a fine of RM200,000 on each of the second and third charges; and

(ii) as against the second appellant, the sentence was reduced to a term of imprisonment of six years.

The learned judge also ordered all sentences to run concurrently.

It is against these orders that the present appeals are directed.

The Case for the First Appellant

(a) The charge of criminal breach of trust

Prior to its amendment in 1993, s 409 of the Penal Code (FMS Cap 45) ('the Penal Code') read as follows:

> Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

The amendments made by Parliament to the section in 1993 have no application to these appeals as they came into force well after the alleged commission of the offences with which the appellants were charged.

It may be seen at once that the section is in two parts. The first part applies in cases where there has been entrustment of property or its dominion to a person — to quote the words of the section — 'in his capacity of a public servant'. The second part of the section applies to cases of entrustment to a category of persons, including an agent — again to quote the section — 'in the way of his business'. Thus, the word 'capacity' applies to a public servant but not to an agent.

That the bifurcation we have alluded to existed in the section as it was previously cast was given judicial recognition by the (then) Supreme Court in *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714. Peh Swee Chin SCJ (as he then was) who delivered the judgment of the Supreme Court on that occasion made the following observation (at p 725 of the report):

> The modifying words 'in his capacity' refer to a public servant and the words 'in the way of his business' refer to 'banker, agent ...'. Decided cases on the phrases do not necessarily apply to both situations provided by the two different phrases for one thing; and it could even lead to serious arguments in court.

In *Cooray v R* [1953] AC 407, the appellant was convicted of an offence under s 392 of the Penal Code of Ceylon which is in *totidem verbis* s 409 of our Penal Code. The charge recited that the appellant, Cooray, had been entrusted with certain money, 'in the way of his business as an agent'. On appeal to the Privy Council, the board, at the conclusion of arguments, allowed the appeal and substituted a conviction under s 389 of the Ceylon Code, which provision is identical to s 406 of our Code.

Later, when delivering the written advice of the judicial committee, Lord Porter made certain observations about the way in which the equipollent of s 409 is to be applied. We find it necessary to quote from his judgment at length.

After setting out the gamut of sections among which s 392 was to be found, his Lordship said (at pp 415–416):

> The question for their Lordships, therefore, is in the first instance whether the appellant is a member of the class or one of the classes embraced in s 392, or otherwise included amongst those referred to in the section. It was held in the courts of Ceylon, and is maintained by the respondent, that the appellant was entrusted with property in the way of his business as an agent and converted it to his own use and consequently comes directly within the words of the statute. On the other hand, the appellant maintains that the offence is limited to the case of one who carries on an agency business and does not comprehend a man who is casually entrusted with money either on one individual occasion or, indeed, on a number of occasions, provided that the evidence does not establish that he carries on an agency business. In the present case, it is maintained, no agency business was carried on: the appellant merely received certain sums of money and kept them temporarily, having provided for their ultimate payments by the encashment of his cheques.
>
> The correctness of these contentions depends on the true construction of the language quoted. For the appellant his submission is put in two ways. Firstly, it is said that whatever might have been the result if the words 'in the way of his "business"' were omitted, their presence excludes the possibility of anyone who does not carry on an agency business coming within the section in as much as no one can misappropriate money 'in his business' unless he is engaged in a business of some sort: a man may casually misappropriate money and be guilty under ss 388 and 389, but he cannot be included in the limited classes struck at in s 392 unless he is a member of one of the categories referred to.

Having thus identified the issues in the case and the appellant's submissions upon them, Lord Porter went on to say as follows (at pp 417–420):

> The argument that the subsection comprehends only those engaged in a particular occupation does not lack authority in England. It is supported by three cases spread over a period of time from *R v Prince* (1827) 2 C & P 517 to *R v Portugal* (1885) 16 QBD 487 and *R v Kane* [1901] 1 QB 472. The principle is perhaps most clearly enumerated in the second of these cases where it is said (at pp 490–491):
>
> > 'It was contended by the Crown, that, although the prisoner was not either a banker, merchant, broker, or attorney, and although he was not

intrusted with either sum of money in any of those capacities, yet he came within the term, 'other agent intrusted with money or valuable security' within the meaning of s 75. To this it was answered that, if that contention of the Crown be correct, the section should have said, 'whosoever, having been intrusted as agent with any money' etc; that no interpretation or effect would be given to the words 'banker, merchant, broker, or attorney;' and that, it was obvious that some effect must be given to those words, if possible, in construing the section, for otherwise the section might be held to apply to everybody intrusted with money to be applied as by the section is provided. In this we agree. We notice that the Larceny Act, a portion of the 75th section of which we are called upon to construe, after in earlier sections classifying various places and things from and of which larceny may be committed — see ss 31, 38, 40, 50, 60, 62 and 63 — proceeds to specify certain classes of persons who may be guilty of the offences therein described; for instance, from ss 67 to 73, clerks, servants, or persons in the public service are classified; in s 74, tenants and lodgers are classified; and in s 75 and afterwards the class aimed at is that of agents, bankers, factors. In our judgment s 75 is limited to a class, and does not apply to everyone who may happen to be intrusted as prescribed by the section, but only to the class of persons therein pointed out.'

So far the reasoning is directly applicable to the case under consideration, subject to such immaterial variations as the provisions of the two Acts require. It is true that the judges who tried the case went on to place some reliance on the fact that the English Act 24 & 25 Vict c 96, s 75, uses the words 'banker, merchant, broker, attorney, or *other* agent' and to draw the inference therefrom that the agent must, like the preceding types, form one of a class. But this is only an additional ground for their decision and is merely used as a support of the view which they already entertained. *Kane*'s case in the Court of Crown Cases Reserved followed *R v Portugal*, though that court was not bound by the earlier decision. Save to this extent it does not add any further support to it.

It was argued on behalf of the Crown that the word 'attorney' has a different meaning in Ceylon from that which it bears in England and that the Act now under consideration does not contain the word 'other.' So far as the second matter is concerned, it is to be noted that the Ceylon Penal Code does include the phrase 'in his business' and in their Lordships' view this expression is at least as important as the word 'other' in the English Act. So far as the word 'attorney' is concerned, their Lordships would point out that the wording of the Ceylon Act is obviously taken direct from the Larceny Act 1812, 52 Geo 3, c 63, s 2, which is repeated in 24 & 25 Vict c 96, s 75.

In the case of an English Act the doctrine is well established that the interpretation put upon an earlier statute by the courts should as a rule be followed in a case where similar words are used in a later statute. So in the case of a colonial statute it has been held by this board that in colonies where an enactment has been passed by the legislature in the same terms as an English statute, the colonial courts should adopt the construction put upon the words by the English courts — see *Trimble v Hill* (1879) 5 App Cas 342. It is true that in that case the decision referred to was one given by the

Court of Appeal and that the courts which it was said should follow it were courts of a colony, but in their Lordships' view English courts should themselves conform to the same rule where there has been a long-established decision as to a particular section of an Act of Parliament, and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of the courts of a member of the British Commonwealth of Nations a similar course should be followed.

In enunciating the construction which they have placed on s 392 they would point out that they are in no way impugning the decisions in certain cases that one act of entrustment may constitute a man a factor for another provided he is entrusted in his business as a mercantile agent, nor are they deciding what activity is required to establish that an individual is carrying on the business of an agent. In the present case the appellant clearly was not doing so, and was in no sense entitled to receive the money entrusted to him in any capacity, nor, indeed, had Mr Ranatunga authority to make him agent to hand it over to the bank.

In *RK Dalmia v Delhi Administration* AIR 1962 SC 1821, the appellant, Dalmia, was charged with criminal breach of trust under s 409 of the Indian Penal Code, which is in terms identical to our s 409 before the latter's amendment. The charge alleged that the offence was committed as 'an agent in your capacity as chairman and the principal officer of Bharat Insurance Co Ltd'. It was argued, relying upon *Cooray*, that the appellant was not an 'agent' within s 409 as he was not a professional agent carrying on the business of agency. The Supreme Court of India rejected this submission.

Raghubar Dayal J, who delivered the judgment of the court said:

What s 409 of the IPC requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression 'in the way of his business' means that the property is entrusted to him 'in the ordinary course of his duty or habitual occupation or profession or trade'. He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of s 409 of the IPC if any breach of trust is committed by that person. This interpretation in no way goes against what has been held in *R v Portugal* (1885) 16 QBD 487 or in *Cooray*'s case [1953] AC 407, and finds support from the fact that the section also deals with entrustment of property or with any dominion over property to a person in his capacity of a public servant. A different expression 'in the way of his business' is used in place of the expression 'in his capacity,' to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make the criminal breach of trust by the agent a graver offence than any of the offences mentioned in ss 406 to 408 of the IPC.

With respect, we are unable to accept the interpretation placed upon the section by their Lordships of the Indian Supreme Court. To adopt the

A view expressed in the passage above quoted would, in our judgment, be tantamount to rewriting the section by means of an unauthorized legislative act. We would, therefore, with respect, prefer the reasoning of the board in *Cooray*.

While accepting that under the former s 409 a single act of entrustment B may constitute a man an agent within the section, we would emphasize that for the section to bite, there *must* be evidence that the entrustment was made to the particular accused by way of his business as an agent.

By way of illustration, the managing director of a company who, either by his contract with his company or by general law, is entrusted with C dominion over his company's property is not to be presumed to be falling within the terms of s 409 by reason of that fact alone. A managing director of a company has, no doubt, been held by the general law to be an agent of the company; but he cannot, upon that sole consideration, be held to have been entrusted in the way of his business as an agent. In other words, the section refers — as was contended at the bar of the Privy Council in D *Cooray* — to persons who are professional agents and not to casual agents, such as a company director.

We have dealt with this point because we notice from the charges framed against the first appellant that he was charged with 'being an agent of the Cooperative Central Bank Ltd, to wit, the chief executive and *in* E *such capacity* entrusted with dominion over certain property' etc. On the authority of *Yap Sing Hock* and *Cooray*, the charges against the first appellant were clearly bad.

Even if — and we use this expression advisedly — the charges against the first appellant had been amended at the close of the case for the F prosecution to accord with the language of s 409, it would not have mattered a jot; for the evidence led at the trial did not establish the ingredient that the entrustment to the first appellant was *in the way of his business* as an agent.

It is unfortunate that these matters were overlooked by all concerned during the proceedings in both the courts below. Had those charged with G the adjudicatory function at both levels — in particular the learned appellate judge — properly addressed their minds to the relevant law instead of being unduly concerned with the haphazard manner in which the bank was being run, it is unlikely that such an elementary point would have been missed.

H

The conviction on appeal

In acquitting the first appellant after having wrongly called upon his defence, the sessions judge had this to say:

> I From the whole evidence adduced in court, I find that the person who was responsible for the success of the application by the three relatives [of Looi] was Mathimugam and the officer made use of was the second accused and the officer deceived was the first accused. I say so because Mathimugam was the managing director cum chairman, management committee of CCB who de facto was more powerful than the first accused.

> ...
>
> *I believe the evidence of the first accused* that he did not know, and that the second accused did not inform him, that the FMFB shares were not yet received. As explained earlier, the second accused was made use of by Mathimugam and he (the second accused) received instructions from Mathimugam at every stage from the time the application was processed, brought into the meeting, varied the guarantee to term loan, varied the conditions and others. (Emphasis added.)

There can be no clearer indication that the sessions judge believed the first appellant upon the critical issue of dishonesty. In those circumstances, there was, in our judgment, no course left open to the sessions judge but to acquit. The law upon the matter was made so clear by his Lordship Suffian J (as he then was) in *Mat v PP* [1963] MLJ 263, that we can do no better than to quote his words (at pp 263–264):

> The correct law for magistrates to apply is as follows. *If you accept the explanation given by or on behalf of the accused, you must of course acquit.* But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it. (Emphasis added.)

See also *Mahadi v PP* [1970] 1 MLJ 16.

In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.

In *Lim Kheak Teong v PP* [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39–40):

> ... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v King-Emperor* AIR 1934 PC 227 and secondly purporting to follow Terrell Ag CJ in *R v Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
>
> With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred '*the High Court should and will always give proper weight and consideration to such matters*' as:
>
> (1) the views of the trial judge on the credibility of the witnesses;
>
> (2) the presumption of innocence in favour of the accused;
>
> (3) the right of the accused to the benefit of any doubt; and
>
> (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 that:

> 'Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.'

The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so.

In *Wilayat Khan v State of Uttar Pradesh* AIR 1953 SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that *in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end*; the second is that great weight should be attached to the view taken by the sessions judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.
>
> ...
>
> Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

We now turn to examine the way in which the appellate judge approached the appeal against the first appellant's acquittal. By reason of the comments we propose to make later, we shall quote from his judgment in extenso:

> The thrust of the first accused's submission was that he acted on second accused's behest or advice or assurance. *After years as a practising solicitor, the first accused cannot claim this to be true and accordingly I have to reject such a defence.* On the contrary *I found the first accused a knowledgeable person, prim and proper when he so chooses and vigilant most of the time except in these matters which now confront him.*
>
> In respect of the documents, Dato Radzi said that the appellant should not have signed but when he signed and certified, the respondent (the first accused) was entitled to assume that everything was in order. In the 'box' presentation in court, this was described as his 'minimal and peripheral involvement in the process of approval and disbursement of the loan'.
>
> Dato Radzi said, 'Procedures existed in CCB but not followed and that whether these were followed or not was not known to the first accused' and added 'the first accused was entitled to assume that these procedures were made'. *Such laxity or lackadaisical attitude, in the cases where legal acts are not*

complied with, is not a good excuse. According to management gurus, no one should assume but instead obtain facts and data. In our case, so long as the procedures were not complied with, it did not matter whether or not any officer thought they were.

In situations like this, it was the duty of the CE to be watchful and ensure every paper presented, every statement made in meetings of the CCB; be they meetings of the management committee or working committee or any other, must be accurate and clear. *To hold otherwise is to accept negligence as a tool of management or to encourage non-performance in leaders of corporations.* Naivety may be excused in some areas of human activities or in the very young but it cannot be so in law.

It was put to me that both accused should be found innocent as what they did merely followed the practices in CCB at that time; or in other words, in a state where there is lawlessness, anyone who commits a crime on the premise he merely went along with the practices thereof is not guilty. On that premise, no one can be guilty of any crime because he obeys his environment notwithstanding that our country has rules and laws prohibiting the very acts committed. I am therefore unable to accept counsel's suggestion.

A picture was painted of Mathimugam who, it was said, is happy (or 'hopping') somewhere in Australia. The second accused claimed that Mathimugam instructed him to process the loan application on 14 June 1986 and to bring it to the working committee on 17 July and recorded the approval of the said loans, and for him to disburse on 11 and 16 July. And it was said Mathimugam dealt with and met Dato' Dr Chen, the principal personality behind the Lipkland Group. Mathimugam was styled the 'big boss'.

Mathimugam resigned in December 1986. I accept that the first accused stayed on in CCB during the troubled times right to the end in a vain effort to keep CCB afloat. In contrast, Mathimugam fled to Australia.

Dato Radzi Sheikh Ahmad stated that R Mathimugam was the force behind Looi's loan. 'It's a wicked world and when a clever man turns his brains to crime, it is the worst of all' (A Conan Doyle in *Adventure of the Speckled Band*). From the evidence so far adduced, I can only agree that Mathimugam is a diabolical character but not a genius. If he is free in Australia, then it can mean that either the Malaysian authorities did not pursue him or that the Australian courts have not been given the full impact of the wrongdoings and crimes committed by this one character which damaged the CCB, its members and credibility.

I had declared early in the proceedings that I was going to visit Australia. I attended the 25th Biennial Conference of the International Bar Association in Melbourne about three weeks ago and learned through the mass media that the Australian Federal Police and the Immigration Department responded positively to Switzerland's police call for assistance in connection with the deaths of 53 followers of a doomsday cult in Switzerland and Canada. In our matter, the exhibits in appeal records at Vol 3 P65, P67A, P67B, P68A and P68B do not appear to be helpful in locating the individuals connected to this case. Perhaps an international arrest warrant might have helped?

Criminals are subject to extradition and anyone who cheats or breaches trust and absconds with other person's property or money cannot hide behind politics.

A WHAT IS CRIMINAL BREACH OF TRUST?

According to *Sathiadas v PP* [1970] 2 MLJ 241 at p 243, the gist of this crime is entrustment and dishonest misappropriation. Loss as a consequence of the act is not a factor; *it is the act itself which amounts in law to this offence.*

Section 405 Penal Code describes the person who may be guilty as one being in any manner entrusted with property or dominion over it. And if that person dishonestly misappropriates (that property), he or she commits 'criminal breach of trust'.

So soon as the accused certified, approved and paid out the loan, or any part of it, notwithstanding whether to an outside body or to another account within his organization and such payment was either outside the ambit of his responsibility or was unlawful, he committed the crime of criminal breach of trust. It does not matter whether the pay-out was for a split second or the amount was paid back within a few days. To hold otherwise will be to encourage officials who have dominion over money or property to misuse their positions and gamble or play the stock and shares. Such persons can then promise that they will settle the sum when the value of the shares go up or make up for the shortfall when the prices go down. That cannot represent the law.

Where the person who commits criminal breach of trust is a public servant or in the way of his business a banker, merchant, factor, broker, attorney or agent, the punishment extends to 20 years' imprisonment and also liable to fine (s 409).

E FINDING OF LAW

Despite learned counsel's contention that it was Mathimugam who was empowered with dominion over CCB's property, evidence was clear that the first accused as the CE at the material time had the dominion and as such entrusted with CCB's property.

While it was not necessary for the accused persons to convince the court of the truth of their explanation, it can only be sufficient if the explanation may reasonably be true: *Murugiah v PP* [1941] MLJ 17; the court did not have to believe the defence story so long as the defence can raise some doubt: *Mahadi v PP* [1970] 1 MLJ 16 or that the explanation was consistent with innocence: *Osman Khan v PP* [1948] MLJ 56.

Much ado has been made over the demise of *Haw Tua Tau* [1981] 2 MLJ 49 and the emergence of *Khoo Hi Chiang* [1994] 1 MLJ 265 when in reality the subordinate courts have been observing the requirements of s 173(f) of the Criminal Procedure Code, ie when the court found that no case against the accused had been made out, which if unrebutted would warrant his conviction, the court recorded an order of acquittal.

There were opposing contentions on whether the High Court can or cannot reverse the sessions court's decision 'on the ground of it being against the weight of evidence' (see *PP v Ma'arif* [1969] 2 MLJ 65). As was rightly pointed out by Mr Manokaran, the appellate court usually considers the distinction between the finding of a specific fact and one where it is actually an inference from a fact. *There is no reason why a reversal should not be ordered if it was found that the decision was grossly against the weight of the evidence.* It is, after all, the duty of the court, in an appeal, to review all evidence presented before the lower court: *PP v Vijaya Raj* [1981] 1 MLJ 43. *One matter which we need to concern ourselves with is whether the sessions court judge had given proper consideration to the facts which were immensely*

material towards the determination of the two accused, first (or respondent's) and second (or appellant's) intention, and I am of the opinion the learned judge did that.

Mr Manokaran said this court could not rebuild the case from the debris. I am pleased to say no such operation was being conducted here. All I had were the notes of proceedings, the record of appeal and the submissions/arguments in court by the learned DPP and both learned counsel plus the documents both in the records as well as those designated as 'asal' and tendered. (Emphasis added.)

Upon these passages, we make the following observations.

First, the appellate judge when rejecting the defence of the first appellant — which had been accepted as true by the sessions court — undertook his own assessment of the first appellant as a witness, when he had not had the benefit of having observed him in the witness box; an advantage which the trial judge distinctly had. This is utterly wrong and smacks of an unwarranted usurpation by the appellate judge of a role that was strictly not his.

Second, it appears from the passages above quoted that the appellate judge did not even bother to address his mind to the relevant principles governing appeals against acquittals. With respect, it would have been far better that he had done so instead of veering off at a tangent as he did.

Judges hearing cases of commercial crime should need no reminder that they are not knights in shining armour — latter day Gallahads — come to rescue a financial institution from ruin. Neither are they, as the appellate judge in this case appears to have perceived his role, avenging angels. They are but servants of the law, obliged to decide cases in accordance with well-established principles as applied to the evidence before them, and they ought on no account — as was done in this case — permit emotion to govern their true role. Emotion is the enemy of reason and there is little doubt that the appellate judge in the present case allowed the former to cloud the latter. It would have been far better for him to quote from relevant decided cases rather than from well-known works of fiction. Had he done so, it is quite possible that he may have decided the appeals correctly.

Third, the rather sweeping remarks of the learned appellate judge that he was under a duty to reverse the sessions court when the decision was grossly against the weight of evidence clearly contradicts his later finding that the sessions court had properly directed itself upon the evidence that was relevant to the issue of dishonesty. To have interfered with the decision of the trial court *after* having found no misdirection is, with respect, unsupportable. And we find it quite amazing that the inconsistency never struck the appellate judge during the process of his reasoning.

Fourth, the learned appellate judge's direction that he was entitled to interfere because, according to him, the decision was grossly against the weight of evidence, completely overlooks the decision of Lee Hun Hoe J (as he then was) in *Ooi Teik Chin v PP* [1971] 1 MLJ 51, which is an authority for quite the opposite proposition. No doubt, the learned appellate

judge in the present case used the expression 'grossly against', but we do not perceive the use of the adjective does anything to detract from the true principle that applies to a case such as the present.

Fifth, the learned appellate judge appears to have treated the actus reus as completing the offence of criminal breach of trust. This comes across from the following two sentences which appear in the passages above quoted:

> Loss as a consequence of the act is not a factor; it is the act itself which amounts in law to this offence. ... So soon as the accused certified, approved and paid out the loan, or any part of it, notwithstanding whether to an outside body or to another account within his organization and such payment was either outside the ambit of his responsibility or was unlawful, he committed the crime of criminal breach of trust.

It is elementary law; and the appellate judge has recognized this elsewhere in his judgment; that the offence of criminal breach of trust is not an offence of strict liability. It is only an offence, under s 405 of the Penal Code, to convert, dispose or to appropriate property if it is done with a *dishonest intention*. To emphasize this most important ingredient which forms the *mens rea* of the offence, we need do no more than to quote from Sir Hari Singh Gour's *Penal Law of India* (10th Ed) Vol 4 at p 3503 which reads as follows:

> The mere violation of law or a legal contract is, however, only one element for consideration. The essential element is dishonesty. The term 'dishonestly' has been defined before, and it has frequently been the subject of discussion. It has been used here in the same sense as in ss 378 and 403 as implying the intention of causing gain or loss by unlawful means of property to which a person gaining or losing is not or is entitled.

Sixth, the learned appellate judge dismissed out of hand, the submission made by Dato Radzi of counsel for the first appellant, based on the defence of honest belief. To make matters worse, the learned appellate judge went on to declare that the existence of a belief on the part of the first appellant that all the papers were in order when he signed the relevant cheques was no defence in law. This statement of the learned judge is quite wrong and offends elementary principles of law. To demonstrate the error into which the learned appellate judge fell, it suffices to quote the following passage from *Nelson's Penal Code* (7th Ed) at p 1529:

> *No criminal breach of trust if action of the accused is in good faith*
>
> A person, who is pleading a claim or right, may be acting without dishonest intention if he is asserting bona fide what he believes to be a lawful claim even though it may be unfounded in law or in fact. If the accused has some claim to the property over which he still retains dominion, there would be no offence unless the claim is merely a pretence, and not bona fide, even if it turns out to be unsustainable in law.

Although this passage is in the context of alleged dishonest misappropriation, we see no difference in principle when the proposition is applied to a case of alleged dishonest use or disposal. A person may dispose of another's property under an honest belief that he is entitled to do so. If it later

transpires that he lacked the authority he believed he had, he will not be guilty of criminal breach of trust. A

Seventh, the learned appellate judge appears to have equated negligence with dishonesty. To remind ourselves, we quote him once again: 'To hold otherwise is to accept negligence as a tool of management or to encourage non-performance in leaders of corporations.' B

It is settled law that negligence; even gross negligence; is not to be equated with the definition of dishonesty under the Penal Code. If any authority is required for this elementary proposition, it is to be found in *PP v Mohamed bin Abdul Jabbar* [1948–49] MLJ Supp 74.

Lastly, the learned appellate judge did not sufficiently address his mind to the decision in *Khoo Hi Chiang*. We find the cavalier fashion in which he approached the judgment of a five-member bench of the Supreme Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned appellate judge ought not to have brushed it aside as he did. C D

We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein. E

Encik Yusof, the learned senior federal counsel who appeared for the respondent, found himself in the unenviable position of trying to support a judgment that was unsupportable. To his credit we must say that he argued the appeal with his usual skill, ability and fairness. He submitted that the sessions judge was wrong in not having regard to the first appellant's knowledge, drawn from the pre-utilization check-list made available to him, that the shares had not been deposited, and for that reason, the money was not to be released. The short answer to that argument is that the sessions judge accepted the evidence of the first appellant that he honestly believed that all was in order when he signed the relevant accounting documents. F G

For the reasons that we have given, we were satisfied that the learned appellate judge's reversal of the sessions court was clearly wrong. Accordingly, the order of conviction entered against the first appellant was quashed and the sentences passed upon him were set aside. H

Before we move on to consider the case of the second appellant, we must say that it is a matter of deep regret that the learned appellate judge, instead of applying his mind to the essential issues in the appeals before him, wasted his time and energy upon wholly irrelevant matters, including revelling about his visit to Australia and the information — utterly useless to the case — he had acquired there. It is our earnest hope that it will not be our misfortune in any future case to express the views we have done here. I

With that, we now turn to deal with the appeal of the second appellant. We must, however, point out that in the course of dealing with his appeal, it will become necessary for us to advert to propositions of law that are of relevance to the first appellant's appeal. This has been occasioned by the way in which arguments were presented in support of, and in opposition to, the latter appeal.

Case for the Second Appellant

It will be recalled that the second appellant was charged with three counts of having abetted the first appellant. In considering these charges, we must make two matters clear.

First, all that has been said in respect of the way in which the charges were framed against the first appellant apply with equal force to the second appellant. As explained earlier, the charges against the first appellant were bad in law because of the decisions in *Cooray* and *Yap Sing Hock*. Put simply, the first appellant was being charged with an offence unknown to the law as it stood at the material date. Accordingly, the second appellant could not be guilty of abetting a non-existent offence. For this reason alone, both appellants were, in truth, guilty of no offence.

Second, upon the assumption that the charges against the first appellant were good (which is certainly not the case), the acquittal of the first appellant on the merits of his defence did not mean that the second appellant was automatically entitled to an acquittal as well. This is because of the law relating to the abetment of offences, a discussion of which now becomes necessary.

(A) THE LAW GOVERNING ABETMENT

The offence of abetment is defined by s 107 of the Penal Code as follows:

> 107 Abetment of a thing
>
> A person abets the doing of a thing who —
>
> First—Instigates any person to do that thing; or
>
> Secondly—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly—Intentionally aids, by any act or illegal omission, the doing of that thing.
>
> *Explanation 1*—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

For present purposes, it is unnecessary for us to reproduce the rest of the section.

As may be seen, s 107 prescribes the several ways in which an offence may be abetted. In the present case, it is clear that the prosecution relied

upon the first limb of the section, namely, abetment by instigation. Indeed, the learned senior federal counsel who responded to these appeals quite properly conceded that this was the position.

The offence of abetment, when it consists of instigation, constitutes a separate and distinct offence. Consequently, an abettor who instigates the commission of an offence or conspires to commit it may be convicted of abetment, notwithstanding that one who is charged with the principal offence has been acquitted. It is otherwise where the abetment consists of intentional aiding: in such a case, acquittal of the principal offender must result in the acquittal of the abettor.

We find the statement of principle by Thomson J (as he then was) in *Kee Kim Chooi & Ors v PP* [1952] MLJ 180 that abetment is a separate offence to be too wide and as not representing the law upon the subject. Instead, we would accept as correct the enunciation of the principle by the Supreme Court of India in *Faguna Kanta Nath v State of Assam* AIR 1959 SC 673, which accords with the view we have expressed in the previous paragraph.

(B) WAS THERE CRIMINAL BREACH OF TRUST?

The offence of criminal breach of trust, which the second appellant is said to have abetted is defined by s 405 of the Penal Code as follows:

> 405 Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'.

In *PP v Yeoh Teck Chye* [1981] 2 MLJ 176 at p 178, Wan Suleiman FJ explained the ingredients of the offence in the following passage:

> Harking back to first principles, for a person to be guilty of the offence of criminal breach of trust he should be:
>
> (i) entrusted with property or dominion over the property;
>
> (ii) (a) that he should dishonestly misappropriate or convert it to his own use OR
>
> (b) dishonestly use or dispose of the property or wilfully suffer any other person so to do in violation of
>
> (iii) (a) any direction of law prescribing the manner in which such trust is to be discharged OR
>
> (b) of any legal contract made touching the discharge of such trust.

Before us, the learned senior federal counsel, Encik Yusof, fairly conceded that the prosecution's case against the first appellant was that he committed criminal breach of trust by dishonestly disposing of the bank's money. As the argument developed, it became clear that the gravamen of the prosecution's complaint is that the money was released before the shares

had been deposited and that this was contrary to the terms of the contract between the bank and the borrower as reflected in the letter of offer dated 30 June 1986.

With respect, what was overlooked by all concerned in both courts below is reflected in the observation made by Shankar JCA in the course of the learned senior federal counsel's response to the second appellant's appeal, namely, that the letter of offer was not cast in stone, but by its very terms was subject to variation. Again, as pointed out by Shankar JCA during argument, the decision by the management committee on 23 July 1986 to dispense with the shares rendered the failure to deposit them a non-issue.

In essence, the offence of criminal breach of trust is an offence relating to property and its commission is directed against the beneficial owner of that property. So, there can be no criminal breach of trust where the beneficial owner consents to the use of the property in a particular way. That consent of the beneficial owner is a complete defence to the offence of criminal breach of trust is to be found in the words 'in violation ... of any legal contract, express or implied, which he has made touching the discharge of such trust'.

The beneficial owner of property who entrusts it, or dominion over it, to another under an express or implied contract — for the purposes of s 405 — must retain the ultimate control over its use or disposal. If there is an express contract governing the discharge of the trust, then it is a question of construing its terms to determine the nature and extent of the duty cast upon a person accused of having dishonestly dealt with the property. If the contract is implied, then it is a question of determining any term the law may properly imply into it.

Both cases involve a question of law: it is a question of law as to what the express terms mean; and it's equally a question of law as to what the terms are of an implied contract. In our judgment, it is an implied term in every entrustment under the express or implied contract, referred to in s 405, that the owner of property may give his express or implied consent to its use or disposal in a manner that differs from the original terms governing its use or disposal. Any other view of the matter would result in adversely affecting the rights over property of a beneficial owner conferred upon him by the general law.

Then the question arises: must there be prior consent? The learned senior federal counsel public prosecutor, relying upon the decision in *PP v Yeoh Teck Chye* submits that this question must receive an affirmative answer.

In *Yeoh Teck Chye*, the defence was that there had been express authority conferred upon the second accused to make the loans or alternatively, that the supreme authority of Bank Buruh had ratified the loans in question. Having held that there was no express authority, Wan Suleiman FJ when delivering the judgment of the Federal Court went on to say as follows (at p 180):

> We are satisfied that this ratification by the management committee and the Board of directors must prima facie indicate that the supreme authorities of the bank far from confirming that the second accused had the authority to grant the short term overdrafts were merely engaged in taking steps to protect the bank's interest, and to make the best out of a bad bargain, and possibly to regain the confidence of Bank Negara.
>
> As regards the effect of ratification on criminal liability two authorities were brought to our notice viz *Yeow Fook Yuen v R* [1965] 2 MLJ 80 and *Mangal Sen v Emperor* AIR 1930 Lah 57. *From these authorities we are satisfied that ratification would not exonerate a criminal offence* and no authority we are aware of or which has been brought to our notice says otherwise.
>
> We therefore hold that the act of ratification is of no assistance to the defence.

In *Yeow Fook Yuen*, the accused were charged and convicted of having committed, inter alia, criminal breach of trust of certain money, which had been taken as loans or advances. It transpired that, well after these loans or advances had been taken and police investigations had commenced, the executive council of the union had passed a resolution approving the loans and advances in question. It was argued that this subsequent approval was valid. When dismissing the appeal against conviction, Wee Chong Jin CJ said (at p 82):

> The main defence of both appellants was that this sum of S$7,500 was taken by the second appellant by way of loan or loans from time to time, that these loans were approved by the executive council of the union.
>
> It is clear that if the executive council of the union had given the first appellant prior authority to make advances or loans to the second appellant specifically or to any paid servant of the union generally, the prosecution must fail. *The case for the prosecution is that there was no such prior authority given by the executive council of the union nor is it the case of both appellants that there was such prior authority or approval.*
>
> ...
>
> The trial judge in his long and careful judgment after setting out the case for the prosecution and the case for the defence in this issue of knowledge or approval by the executive council of the union came to the conclusion that the executive council were never informed of these so-called advances or loans, never discussed them and never sanctioned the fact of their having been made until 15 October 1962 and in that connection accepted the evidence of Latiff a prosecution witness who was at all material times the president of the union.
>
> *With regard to the effect of the approval given by the executive council on the 15th October 1962 when it passed a resolution at a meeting specifically called to consider the matter of the advances taken by the second appellant, the trial judge came to the conclusion 'that the executive council has no power nor any authority to condone the criminal offences that had already been committed by the two appellants and which were then under investigation by the police.'*
>
> ...

(At p 83):

> *It was next contended that the approval given by the executive council on 15 October 1962 after these advances or loans was a valid and effective approval and afforded a complete defence in law in respect of the present charges. Counsel for the appellants was however unable to draw my attention to any authority in support of his contention and I need only say that in my opinion the trial judge was correct in rejecting this defence contention.* (Emphasis added.)

It may be seen from the foregoing passages that no authority was cited for either proposition; that advanced by the learned district judge, whose view was affirmed by the learned Chief Justice, or that advanced by the accused. Secondly, the ratification in that case came well after the police had commenced investigations. That is not the case here.

In *Mangal Sen*, the accused Mangal Sen was convicted of an offence of criminal breach of trust in respect of certain money which he claimed were merely paper transactions. His other defence to the charge was that he had obtained a resolution of the bank's board ratifying the impugned transactions. The High Court, on appeal, unsurprisingly rejected the defence that the transactions in question were mere book entries and therefore only on paper. It also held the resolution relied upon by Mangal Sen to be ultra vires because the meeting at which it was passed lacked a quorum. It therefore transpired that there was in fact no valid resolution ratifying the impugned transactions.

With respect, we are unable to read these two cases as being authority for the proposition that a use or disposal of property entrusted under s 405 of the Penal Code can *never* be ratified by its beneficial owner. In our judgment, whether there can be a valid consent subsequent to the impugned use or disposal depends upon the facts of each case. There may be cases where the ratification is but a cloak to cover up a dishonest act. This, indeed, was the position in *Yeow Fook Yuen*. In *Yeoh Teck Chye*, as the court found, the true purpose of the ratification was to save Bank Buruh and to regain Bank Negara's confidence. In *Mangal Sen*, there was an invalid ratification. In all these cases, there was no genuine consent subsequent to the use or disposal.

But where facts emerge to show that there was true consent in its legal sense, the fact that it did not precede the use or disposal cannot, in principle, make the slightest difference to the question. Such subsequent consent would, in accordance with well-established principles of the law of agency, relate back to the use or disposal that is the subject of challenge. We emphasize that for the principle to apply, there must be present all those elements which would constitute consent in law.

In the present appeals, the authority to deal with the property of the bank was vested in the management committee. There is no doubt that it was empowered to have dispensed with the shares ab initio. Once it made up its mind at its meeting on 23 July 1986 to dispense with the requirement that the shares should be deposited, the whole issue became academic. As

was conceded by the learned senior federal counsel, in answer to a question put to him by Shankar JCA during argument, if the shares had been there from the beginning, no offence would have been committed.

(c) WAS THERE ABETMENT?

All that we have said thus far is sufficient to dispose of the second appellant's appeal: he was guilty of no offence for the reasons given. Encik Manokaran, who appeared for the second appellant, has also argued that there had been no proper judicial appreciation of the evidence on the issue of abetment. We think we owe it to the efforts of counsel who has argued the appeal with some care to deal with the point raised.

The main evidence relied upon by the trial court to convict the second appellant upon the charge of abetment is the testimony of the first appellant to the effect that he had been deceived by the second appellant into believing that all the documents were in order at the material time. But there is other evidence to negative culpability on the part of the second appellant.

Thus, in the check-list which accompanied the accounting documents there is made mention of the fact that the shares were yet to be deposited. The second appellant's case is that he had made the relevant notation in the check-list and the first appellant would have realized the true position if he had carefully studied the document. The very fact that the second appellant made the notation repels any suggestion of misrepresentation of the true position.

Encik Manokaran submitted that his client ought not to be blamed if the first appellant overlooked the notation. We are of the view that counsel is correct in the submission he made. In the light of this telling evidence, the learned sessions judge ought to have directed his mind sufficiently to the point taken by the second appellant. We must add, in fairness to the second appellant, that the evidence presented fell far short of establishing a case of abetment by instigation.

Unfortunately, the sessions court did not address itself sufficiently to the evidence in favour of the defence, especially the evidence in the form of contemporaneous documents, and instead concentrated its attention solely upon the evidence that was unfavourable to the second appellant. It is equally unfortunate that the learned appellate judge also failed to address his mind to this point.

The approach adopted by the trial court to the evidence before it amounts to a misdirection that has occasioned a miscarriage of justice. Therefore, quite apart from the points of law on which these appeals must succeed, the second appellant was entitled to an acquittal upon the factual merits of his case.

Conclusion

For the reasons given, we are of the view that the appellants ought to have been acquitted at the close of the case for the prosecution. The trial judge

was therefore wrong in ordering both appellants to enter upon their defence. On appeal, the learned appellate judge was wrong in reversing the order of acquittal that had been made in the first appellant's favour by the trial court and in dismissing the second appellant's appeal against conviction.

In the circumstances, we had no alternative but to allow these appeals and to acquit the appellants.

Postscript

In the interests of justice, we wish to make it quite plain once again that the appellants in these appeals, whose names will no doubt figure in one or more of our law reports, ought not to have been convicted of any offence. They leave this court without a stain upon their character.

We thank all counsel who appeared in these appeals for their careful and well-researched submissions. We would, in particular, make special mention of the learned senior federal counsel, Encik Yusof, who appeared for the respondent. Although he did not appear in either of the courts below, his complete familiarity with the several documents — as well as passages in the evidence and their exact location amidst the voluminous records in these appeals — helped us immensely during argument.

Appeals allowed for the first and second appellants.

Reported by Tee Boon Cheong